

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

GREENWASTE RECOVERY, INC.

Employer

and

Case 32-RC-260301

**TEAMSTERS LOCAL 350, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS**

Petitioner

**DECISION AND ORDER OVERRULING PETITIONER'S OBJECTION AND
CERTIFICATION OF RESULTS**

Based on a petition filed on May 12, 2020,¹ and pursuant to the Regional Director's Decision and Direction of Election that issued on June 30, an election was conducted by mail from July 8 to July 29, to determine whether a unit of drivers and driver helpers employed by GreenWaste Recovery, Inc. (Employer) at its recycling and diversion facility located in San Jose, California, wish to be represented for purposes of collective bargaining by Teamsters Local 350, International Brotherhood of Teamsters (Petitioner). That voting unit consists of:

All full-time and regular part-time drivers and driver helpers employed by the Employer at or out of its facility located in San Jose, California; excluding all other employees, confidential employees, office clerical employees, guards, and supervisors as defined in the Act.

The tally of ballots prepared on July 31 shows that of the approximately 83 eligible voters, 38 votes were cast for, and 44 votes were cast against, the Petitioner, with no challenged ballots.

THE PETITIONER'S OBJECTION

On August 7, the Petitioner timely filed its Objection to the Conduct of the Election and to Conduct Affecting the Results of the Election (Objection), and an offer of proof in support thereof. A copy of the Objection is attached hereto. I will first set forth the Board's standards for setting aside elections and for evaluating offers of proof. I will then summarize the objections and address them below based on the Board's standards.

Board Standards for Setting Aside Elections and for Evaluating Offers of Proof

"Representation elections are not lightly set aside" *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (citations omitted) and "[t]here is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the

¹ All dates refer to calendar year 2020.

employees." *Id.* at 328. The objecting party bears the "entire burden" of showing evidence that misconduct warrants overturning the election. *Id.* at 328. The burden of proof is on the party seeking to set aside a Board-supervised election, and that burden is a "heavy one." *Lalique N.A., Inc.*, 339 NLRB 1119, 1122 (2003); *Chicago Metallic Corp.*, 273 NLRB 1677, 1704 fn. 163 (1985). The objecting party's burden encompasses every aspect of a *prima facie* case. *Sanitas Service Corp.*, 272 NLRB 119, 120 (1984).

The standard used to determine whether objectionable conduct occurred varies depending upon who is alleged to have committed the misconduct. Where, as here, the objecting party alleges that the other party to the election, or its agent, committed the objectionable conduct, the objecting party must show not only that the acts occurred by the other party's agent, but also that they "interfered with the employees' exercise of free choice to such an extent that they materially affected the results of an election." *NLRB v. Gulf States Cannerys*, 634 F.2d 215, 216 (5th Cir. 1981). See *Cedars-Sinai Medical Center*, 342 NLRB 596, 597 (2004) (citing *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995) (conduct is objectionable "if it has the tendency to interfere with the employees' freedom of choice.")). Additionally, where, as here, the objecting party (alternatively) alleges that a third party or nonparty to the election committed objectionable conduct, the test is "whether the conduct at issue so substantially impaired the employees' exercise of free choice as to require that the election be set aside." *Rheem Mfg. Co.*, 309 NLRB 459, 463 (1992), quoted in *Hollingsworth Management Services*, 342 NLRB 556, 558 (2004).

Section 102.69(a) of the Board's Rules and Regulations provides that when filing objections to an election, the objecting party must include a short statement of the reasons for the objections, and an offer of proof in the form described in Section 102.66(c). Section 102.66(c) provides that the offer of proof shall identify "each witness the party would call to testify concerning the issue and summarizing each witness testimony." If the Regional Director determines that the evidence described in an offer of proof is insufficient to sustain the proponent's position, the evidence shall not be received. If the Regional Director determines that the evidence described in an offer of proof accompanying objections "would not constitute grounds for setting aside the election if introduced at a hearing, the Regional Director shall issue a decision disposing of the objections." Section 102.69(c)(1)(i) of the Board's Rules and Regulations. See also NLRB Casehandling Manual, Part Two- Representation Proceedings, Sec. 11395.1.

The Board places the burden on the objecting party to furnish evidence or a description of evidence that, if credited at hearing, would warrant setting aside the election. *Jacmar Food Service Distribution*, 365 NLRB No. 35, slip. op. 1, fn. 2 (2017), citing *Transcare New York, Inc.*, 355 NLRB 326 (2010). The Board has long held that an objecting party must provide probative evidence in support of its objections; it is not sufficient to rely on mere allegation, conclusory statements, or suspicion. See *Allen Tyler & Son, Inc.*, 234 NLRB 212, 212 (1978) ("In the absence of any probative evidence, [the Board] shall not require or insist that the Regional Director conduct a further investigation simply on the basis of a 'suspicious set of circumstances'"). In short, to merit investigation by a regional director and to warrant a hearing, the offer of proof must be "reasonably specific in alleging facts which *prima facie* would warrant setting aside an election." *Audubon Cabinet Company*, 119 NLRB 349, 350-351 (1957); *Care*

Enterprises, 306 NLRB 491 (1992). The Board has repeatedly upheld Regional Directors' decisions to overrule objections when the supporting offer of proof is deficient. See e.g., *Builders Insulation, Inc.*, 338 NLRB 793 (2003); *The Daily Grind*, 337 NLRB 655 (2002) (unsupported allegations are insufficient to trigger administrative investigations); *Heartland of Martinsburg*, 313 NLRB 655 (1994); *Holladay Corp.*, 266 NLRB 621 (1983); *North Shore Ambulance*, 2017 WL 1737910 (NLRB) (May 3, 2017), citing *Park Chevrolet-Geo, Inc.*, 308 NLRB 1010, 1010 fn. 1(1992), and Secs. 102.69(a) and 102.69(c)(1)(i) of the Board's Rules and Regulations (concluded that Regional Director properly overruled the Employer's Objection "without a hearing based on the Employer's deficient offer of proof").

In *XPO Logistics Freight, Inc.*, No. 13-RC-184190, 2017 WL 1294849, at fn.1 (Apr. 6, 2017), the Board denied the employer's request for review of the Regional Director's decision overruling objections and issuing a certification of representative where the employer's evidence in support of its objections failed to "constitute grounds for setting aside the election if introduced at a hearing under Sec. 106.67 (c)(1)(i)." With respect to one of the objections in that case, the Board noted that the employer "neither identified the alleged Union agents or supporters who purportedly threatened employees into supporting the Union, nor specified the objectionable statements they assertedly made." *Id.* The Board went on to explain that its conclusion that the employer's offer of proof was deficient "stems not from its failure to submit a voluminous offer of proof, but from the Employer's failure to allege and support conduct which, if credited, *would* warrant setting aside the election." Citing NLRB Casehandling Manual, Part Two- Representation Proceedings, Sec. 11395.1 (emphasis in original).

In *XPO Logistics Freight, Inc.*, 365 NLRB No. 105 at fn. 1 (July 6, 2017), the test-of-certification case that arose after the Board's denial of the employer's request for review, the Board granted the General Counsel's motion for summary judgment. The employer then appealed the Board's decision to the Court of Appeals for the District of Columbia. In denying the employer's petition for review that challenged the Board's decision to overrule its objections without a hearing in the underlying representation case, the D.C. Circuit noted that an evidentiary hearing is "called for only when a party makes a *prima facie* showing of substantial and material issue of fact, which if true, would warrant setting aside the election." *XPO Logistics Freight, Inc. v. NLRB*, 2018 WL 2943938 at p.2 (D.C. Cir. May 25, 2018) (citations omitted). The Court also noted that the *prima facie* showing "cannot be conclusory" and must "point to specific events and specific people." *Id.* (citations omitted). It therefore agreed that the employer's offer of proof was "devoid of factual specifics about who said or did what to whom that, if credited by a factfinder," could support a determination that the conduct was coercive. *Id.*

Objections:

"The secrecy of the ballot was destroyed. The Employer, through its agents and/or apparent agents, solicited the collection of ballots, collected ballots, solicited photographs of ballots, solicited employees to accept assistance completing the ballots and made threats and/or implied threats. In the alternative, bargaining unit employees destroyed the secrecy of the ballot by engaging in this widespread

conduct destroying the secrecy of the ballot and creating the impression of surveillance of employees' votes."

In short, the Petitioner alleges that (1) the secrecy of ballots was compromised; (2) that the Employer, through its agents, engaged in various objectionable solicitations and threats; and (3) alternatively, that nonparty or third-party employee actors destroyed the secrecy of ballots.

Offer of Proof:²

In its offer of proof to support its Objection, the Petitioner identified the following five employee witnesses.

The first employee witness (Witness #1) would testify that a vocal anti-Union employee (Employee A) asked him and other unnamed bargaining-unit employees to take photos of their marked ballots showing their "no" vote, and stated, "then you'll be clear."

The second employee witness (Witness #2) would testify that Employee A, "working closely with management," asked Witness #2 and other unnamed employees for their ballots and offered to help them fill it out. Additionally, Witness #2 would testify that an unidentified driver employee told Witness #2, and discussed with other employees that the unidentified driver had submitted his/her ballot to Employee A.

The third employee witness (Witness #3) would testify that a vocal anti-Union employee working closely with management (Employee B) offered to help Witness # 3 and other unidentified employees fill out their ballots to vote "no."

The fourth employee witness (Witness #4) would testify that a vocal anti-Union employee working closely with management (Employee C) requested Witness # 4's ballot in order to photograph it. Witness #4 would also testify that Employee C engaged in solicitation of signatures of employees who are on the "Company's side."

The fifth employee witness (Witness #5) would testify that Employee C and another employee (Employee D) asked Witness #5 for his/her ballot so they could deliver it to Oakland (NLRB Oakland Regional Office) individually to avoid detection, and asked how Witness #5 had voted. Employees C and D asked for a photo of Witness # 5's "no" vote. Employees C and D told Witness #5 and other unidentified employees that the Employer would lay off employees if the Union won.

² Petitioner's offer of proof includes additional testimony covering certain alleged Employer conduct not encompassed by the language of the objection. The alleged conduct includes solicitation of grievances, promises and granting of benefits, interrogation, and threats that occurred outside the critical period. These allegations are therefore outside of the scope of this Decision.

ANALYSIS

(1) The secrecy of the ballot.

It is well-established that an election party's collection of mail ballots is objectionable. "Where mail-ballot collection by a party occurs, we find that it casts doubt on the integrity of the election process and undermines election secrecy." (*Fessler & Bowman, Inc.*, 341 NLRB 932 (2004)). The Board, however, has clearly distinguished solicitation of ballots from actual *collection* of ballots, finding that mere solicitation "did not constitute objectionable conduct because unlike the ballot collection, the solicitation of ballots did not create an opportunity for ballot tampering or for a breach of secrecy." (*Ibid*).

Petitioner's offer of proof does not include specific instances in which the secrecy of any of the mail-ballots in this election was compromised. Witnesses # 1, 3, 4, and 5, would testify that Employees A, B, C, and D, asked them to share photos of their ballots, offered to assist filling out ballots, and/or to witness their "no" votes, and to transport their ballots to the Oakland Regional Office, but Petitioner offered no evidence that any of the five witnesses complied with the requests. The offer of proof includes only hearsay evidence that unnamed employees had shared photos of their ballots or acquiesced to the various purported solicitations. The testimony offered would constitute an insufficient basis to establish that the secrecy of any single ballot was compromised, let alone a number that could have affected the results of the election.

(2) The Employer, through its agents, engaged in various objectionable solicitations and threats.

If the proffered evidence showed that the Employer interrogated employees about their Union sentiments, polled them, made statements that they would be "cleared" if they voted "no," and threatened them with layoff if the Petitioner won the election, each could independently constitute a sufficient basis to set the Objection for hearing, and potentially to set aside the results of the election. To the extent that Employees A, B, C, and D, are alleged agents of the Employer, the principles governing agency are well-established.

Apparent authority results from a manifestation by the employer to a third party that creates a reasonable basis to believe that the employee's conduct was authorized by the employer. Thus, either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that his conduct is likely to create such belief. The test is whether, under all the circumstances, the employees "would reasonably believe that the employee in question (alleged agent) was reflecting company policy and speaking and acting for management." (citations omitted) *Diamond National Glass Company*, 317 NLRB 1048, 1050 (1995).

The offer of proof does not include any facts to establish that the Employer authorized Employees A, B, C, and D to speak or act on its behalf, or that the Employer caused Witnesses #1, 2, 3, 4, or 5 to believe that Employees A, B, C, and D were authorized to speak or act in its

behalf. Testimony in support of the assertion that Employees A, B, C, and D had been vocally anti-Union and that they met with supervisors or agents Employer, without any further proffered evidence of what was said at those meetings or facts to show the Employer cloaked them with any authority to speak or act on its behalf, is insufficient to establish that they were agents of the Employer. In the absence of proffered evidence that the Employer vested them with actual or apparent authority to act on its behalf, their conduct cannot be attributed to the Employer.

- (3) In the alternative, bargaining unit employees destroyed the secrecy of the ballot by engaging in this widespread conduct destroying the secrecy of the ballot and creating the impression of surveillance of employees' votes.

Having found Employees A, B, C and D to be nonparty actors, and applying the nonparty or third-party test to the conduct at issue, I conclude that it did not “so substantially impair the employees’ exercise of free choice as to require that the election be set aside.” *Rheem Mfg. Co.*, supra. To begin, with regard to the alleged comments regarding voting “no” and being in the “clear,” or that layoffs would result from a Petitioner victory, the subject nonparty employees were not capable of “clearing” anyone or laying them off. It is well established that the Board will not find a threat by a party to be objectionable unless the party has the ability to carry out the threat. See e.g., *Smithfield Packing Co.*, 344 NLRB 1, 11 (2004), enf’d 447 F.3d 821 (D.C.Cir. 2006); *Pacific Grain Products*, 309 NLRB 690, 691 (1992). Similarly, the subject nonparty employees’ alleged queries of other employees’ union sentiments, and their unsuccessful solicitation of ballots and photos of others’ ballots do not constitute objectionable conduct. To be sure, the Board frowns on mere (unsuccessful) ballot solicitation, particularly by a party, but it has not found mere ballot solicitation to be objectionable, much less solicitation by a nonparty employee. See e.g., *Fessler & Bowman*, supra. Additionally, the Board recognizes that election campaigns are often passionate and that tensions can run high. It thus excuses exuberant outbursts and other impassioned employee speech that far exceeds what allegedly occurred here. See e.g., *Mastec North America, Inc.*, 356 NLRB 809 (2011)(nonparty employee threatens to “get even with” or “bitch slap” anti-union employees in an election decided by two votes not objectionable). The rationale, put simply, is as follows: the statutory goal of insuring that the election's results reflect the true and uncoerced choice of a majority of those voting “is better served by requiring a more compelling showing to set aside an election when the source of the alleged coercion is the conduct of third parties rather than the conduct of the employer or union.” *Id.* at 811. The showing here is not compelling, and accordingly, I am overruling the Objection in its entirety.

CONCLUSION AND ORDER

I have overruled the Petitioner’s Objections in their entirety for the reasons set forth above and in accordance with Section 102.69(c)(1)(i) of the Board's Rules and Regulations and Section 11395.1 of NLRB Casehandling Manual, Part Two - Representation Proceedings.

Accordingly, I HEREBY issue the following:

CERTIFICATION OF RESULTS OF ELECTION

IT IS HEREBY CERTIFIED that a majority of the valid ballots has not been cast for any labor organization and that no labor organization is the exclusive representative of the employees in the bargaining unit described below.

All full-time and regular part-time drivers and driver helpers employed by the Employer at or out of its facility located in San Jose, California; excluding all other employees, confidential employees, office clerical employees, guards, and supervisors as defined in the Act.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67(c) of the Board's Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary of the National Labor Relations Board. The request for review must conform to the requirements of Section 102.67(d) and (e) of the Board's Rules and Regulations and must be filed by **September 11, 2020**.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated: August 28, 2020



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